BUSINESS LAW SECTION

CORPORATIONS COMMITTEE
THE STATE BAR OF CALIFORNIA
180 Howard Street
San Francisco, CA 94105-1639
http://www.calbar.org/buslaw/corporations

TO: Office of Governmental Affairs

FROM: Corporations Committee

RE: SB 1550 (Florez), as amended April 24, 2008

Committee Position:

☒ Oppose

Date position recommended:	June 6, 2008	
Corporations Committee vote:	May 2, 2008: 16-0 (with delegation of authority to drafting committee)	May 15, 2008: 4-0 (drafting committee approval of revisions, per delegated authority)
Executive Committee vote:	April 4, 2008: 15-0 (delegation of authority to Legislative Subcommittee)	May 19, 2008: 7-0 (vote of Legislative Subcommittee)
Contact:	W. Derrick Britt Vice Chair, Legislation Doty Barlow Britt & Thomas LLP 260 Sheridan Avenue, Suite 200 Palo Alto, CA 94306 Tel: (650) 327-0100 Fax: (650) 327-0101 Derrick@dotylaw.com	

I. Statement of Position

The Corporations Committee (the "Committee") of the Business Law Section of the State Bar of California (the "Section") welcomes this opportunity to comment upon SB 1550 (the "Bill"). This is the second statement of position (the "Statement of Position") that the Committee has submitted on this matter.[1]

The Committee acknowledges that there may be valid public policy reasons for requiring public companies to disclose specific matters relating to the environment and its business; however, for the reasons noted in this Statement of Position, the Committee opposes the Bill in its current form.

[1] The first statement of position was submitted when the Bill was under consideration by the Senate Committee on Environmental Quality.

A. Description of SB 1550.

The Bill would require the California Controller, in consultation with the investment community, to develop a standard by which every "listed company" that does business in California would, if it chooses to adopt such standard, affirmatively disclose information relating to (i) its greenhouse gas emissions, (ii) its efforts to effectuate changes in climate change policy, (iii) actions it is taking to minimize climate change risks, (iv) actions taken by its board to address climate change, (v) any linkages between executive compensation and achievement of corporate climate objectives, (vi) an assessment of the physical effects climate change may have on its business and operations, and (vii) an analysis of the potential impact on its business of governmental climate change regulations. The Bill would require the Controller to establish this new disclosure standard using "globally accepted climate change disclosure standards" and publish the disclosure standard on its Internet Web site by December 1, 2009; thereafter, the Controller would be obligated to periodically revise the standard in order to meet "investor needs" and incorporate "new understandings of the risks and opportunities of climate change." The Bill contemplates that listed companies would make such disclosure in their public filings made with the United States Securities and Exchange Commission (the "SEC") or by other means.

B. The Committee's Position.

The Committee has significant concerns about the Bill, both in concept as well as with respect to its specific terms, and opposes SB 1550 conceptually for the reasons noted below.

1. ***Disclosure is duplicative of existing Federal disclosure standards***. The Bill seeks to encourage companies with publicly traded securities doing business in California to disclose information about climate change risk that is material to investors. Even though the Bill imposes no mandatory disclosure requirements, the Bill's disclosure objective is already addressed by existing federal securities laws, rules and regulations. On September 18, 2007, Ceres,[2] the primary sponsor of the Bill, and a group of significant institutional investors filed a petition with the SEC, which acknowledged that existing federal securities law currently requires public companies to disclose matters concerning climate change to the extent that such matters are material to investors[3]. SEC rules admittedly do not include a specific line-item requirement concerning climate change risks, much like such rules do not include a specific line-item requirement mandating disclosure of earthquake risk for companies with assets located in areas of seismic activity or product liability risk for tobacco companies. Nevertheless, the existing SEC rules require all public companies to disclose "specific known trends, events or uncertainties that are reasonably likely to have a material effect on a company's financial condition or operating performance." If climate change issues pose a material risk to a particular public company, then that company would be required to disclose such risk. Given these existing federal securities law requirements, we question the utility of creating a duplicative disclosure regime in California.

2. ***The Bill does not provide additional protections for investors***. The objective of the Bill is to cause public companies to disclose climate change risks that do not otherwise fall within current SEC disclosure rules (i.e., those that by definition are not material to investors). However, investors are not served by mandating disclosure of information that is immaterial to an investor's investment decision. While there may be valid public policy reasons for requiring companies to make public disclosures about various environmental matters, such requirements should be considered as part of California's

[2] Ceres is a national network of investors, environmental organizations and other public interest groups working with companies and investors to address sustainability challenges such as global climate change (www.ceres.org).

[3] See page 13, Section 2 of the Ceres Petition to the SEC submitted September 18, 2007.

environmental regulatory policy and not be bolted onto provisions of the California Corporations Code that address duties and responsibilities of corporate directors and managers.

3. ***Costs of implementation***. The Committee recognizes that the Bill was reported to the Senate floor pursuant to Senate Rule 28.8. The Committee respectfully believes, however, that the Bill would require the State of California to incur significant cost to implement and maintain a new environmental disclosure regime. There is no California agency that has regulatory expertise or experience in devising and administering a corporate disclosure regime similar to what is done at the federal level. The SEC has a staff of hundreds of employees to engage in rulemaking, interpretation, granting waivers and enforcing federal securities laws, rules and regulations pertaining to company disclosure in periodic reports. Implementation of the Bill would require the State to use resources to assist in drafting and continually updating a set of disclosure rules involving complex and evolving issues, which would require new funding or diversion of resources from other governmental programs.

4. ***No expertise in regulations of this nature***. The Controller is not the right entity to devise, administer and update regulations relating to environmental disclosure standards. The Controller has no relevant experience in drafting environmental regulations or substantive corporate disclosure rules. Further, as far as this Committee has been able to determine, the Controller's duties bear little relation to the investor concerns which motivate the Bill. The California Department of Corporations has more relevant experience drafting securities law regulations, though not of a similar nature in terms of the extent of disclosure contemplated and certainly not substantive environmental expertise. The Bill contemplates that the Controller will seek the assistance of the "investment community" in devising the new climate change disclosure standard and use "globally accepted climate change disclosure standards" to the greatest extent possible, though the Bill is silent as to which investors comprise the "investment community," does not expressly contemplate involving the listed companies most likely to be affected by this new disclosure regime, and presumes that there are in fact globally accepted climate change disclosure standards.

II. Germaneness

The Committee believes that its members have the special knowledge, training, experience and technical expertise to provide helpful comments on the Bill and that the positions advocated herein are in the best interests of listed companies and their shareholders.

III. Caveat

This statement is that only of the Committee. The positions expressed herein have not been adopted by the Section or its overall membership or by the State Bar's Board of Governors or its overall membership, and are not to be construed as representing the position of the State Bar of California. There are currently more than 8,800 members of the Section. Membership in the Section is voluntary and funding for its activities, including all legislative activities, is obtained entirely from voluntary sources.

cc: Steven K. Hazen
Vice Chair Legislation
Business Law Section Executive Committee